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Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF OREGON

Kipland Kinkel,

PETITIONER,

vs.

Gerald Long, Acting Superintendent,  
 Oregon State Correctional  
 Institution,

RESPONDENT.

**CV 11-746 - NA**  
**PETITION UNDER 28 U.S.C.**  
**§2254 FOR WRIT OF**  
**HABEAS CORPUS BY A**  
**PERSON IN STATE CUSTODY**

The nature of the crimes committed by the petitioner and the number of victims injured by them has generated wide publicity and justifiably highly emotional responses. For the benefit of those persons, petitioner wishes to make clear that by seeking relief here he does not seek to evade responsibility for his actions. His plea was and always will be guilty – but his claim here, as in his post-conviction action, is that he is guilty but insane and should be incarcerated at the state mental hospital rather than state prison.

#41078

1. (a) Name and location of court which entered the judgment of conviction you are challenging: Lane County Circuit Court.
- (b) Criminal docket or case number: Case No. 20-98-09574.
2. (a) Date of judgment of conviction: September 24, 1999.
- (b) Date of sentencing: November 2, 1999.
3. Length of sentence: 1,340 months.
4. Were you convicted on more than one count or of more than one crime? Yes.
5. Identify all crimes of which you were convicted and sentenced in this case: On each of the four murder convictions, the trial court imposed a 25-year prison term, run concurrently with one another, and a life term of post-prison supervision. On each of the 26 attempted aggravated murder convictions the court imposed a 90-month prison term and a three year term of post-prison supervision. The court ordered that 40 months of each of the 26 90-month prison terms run consecutive with each other and with the four concurrent 25-year terms on the murder convictions. The trial court thus imposed a total prison term of 1,340 months (25 years = 300 months, plus 26 X 40 = 1,040 months, or 111 years and 8 months).
6. (a) What was your plea? Guilty.
- (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you please not guilty to: N/A.
- (c) If you went to trial, what kind of trial did you have: N/A.
7. Did you testify at a pretrial hearing, trial or a post-trial hearing? Yes, by discovery deposition in post-conviction action.
8. Did you appeal from the judgment of conviction? Yes.
9. If you did appeal, answer the following:
  - (a) Name of court: Oregon Court of Appeals.
  - (b) Docket or Case number: unknown.
  - (c) Result: affirmed in a written opinion.
  - (d) Date of result: October 16, 2002.
  - (e) Citation to the case: *State v. Kinkel*, 184 Or App 277, 56 P3d 463 (2002).
  - (f) Grounds raised: N/A (none raised in this petition).

- (g) Did you seek further review by a higher state court?
- (1) Name of court: Oregon Supreme Court.
  - (2) Docket or case number: unknown.
  - (3) Result: conviction and sentences affirmed.
  - (4) Date of result: December 24, 2002 (judgment issued January 29, 2003).
  - (5) Citation to the case: *State v. Kinkel*, 335 Or 142, 61 P3d 938 (2002).
  - (6) Grounds raised: N/A.

- (h) Did you file a petition for certiorari in the United States Supreme Court?
- No. If yes, answer the following: No.
- (1) Docket or case number: N/A.
  - (2) Result: N/A.
  - (3) Date of result: N/A.
  - (4) Citation to the case: N/A

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? Yes.

11. If your answer to 10 was "yes," give the following information:

- (a)
- (1) Name of court: Marion County Circuit Court.
  - (2) Docket or case number: 03C-21079.
  - (3) Date of filing: December 18, 2003.
  - (4) Nature of the proceeding: Post-conviction proceeding
  - (5) Grounds raised:

A. Petitioner was denied effective assistance of trial counsel, who failed to meet the minimum constitutional standards for effective assistance of counsel, in violation of petitioner's rights under Article I, § 11 of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution in each of the following respects, among others to be proved at trial:

1. Petitioner's trial counsel failed to request that the trial court order a mental examination to determine petitioner's competency to stand trial, his ability to aid and assist in his own defense, and his fitness to proceed by reason of incapacity due to a mental disease or defect. Had such an examination been obtained, it would have revealed that petitioner was mentally incompetent to stand trial, mentally unable to aid and assist in his own defense, unfit to proceed by reason of incapacity due to a mental disease or defect, and mentally unable to knowingly, voluntarily and intelligently waive his constitutional rights. Effective trial counsel would have relied upon such examination and neither advised nor permitted petitioner to enter the guilty pleas which resulted in a 111 year prison sentence.

1           2. Petitioner's trial counsel failed to object to the trial court's acceptance of  
 2 the guilty plea and the trial court's plea colloquy with petitioner, which did not  
 3 adequately determine whether petitioner's mental condition affected his ability to  
 4 knowingly, voluntarily and intelligently waive his constitutional rights. Had trial  
 5 counsel made such an objection, the trial court would have conducted a more  
 6 extensive plea colloquy, which would have revealed that petitioner was suffering  
 7 from paranoid schizophrenia, auditory hallucinations, and impaired neurologic  
 8 function, such that the trial court would not have accepted petitioner's guilty plea, and  
 9 if the trial court had nonetheless accepted the plea, appellate counsel could have  
 10 raised the trial court's acceptance of the plea on direct appeal.

11           3. Petitioner's trial counsel failed to object to the trial court's acceptance of  
 12 petitioner's plea without the knowing, voluntary and intelligent consent and waiver,  
 13 in writing and on the record, by petitioner's guardian ad litem, Claudia Jurowski.  
 14 Had trial counsel made such an objection, the guardian *ad litem* would not have  
 15 consented to the plea agreement, the trial court would not have accepted petitioner's  
 16 plea, and if the trial court had nonetheless accepted the plea, appellate counsel could  
 17 have raised the trial court's acceptance of the plea on direct appeal.

18           4. Petitioner's trial counsel advised petitioner to accept a plea agreement in  
 19 which petitioner gave up a substantial mental defense without receiving adequate  
 20 consideration. Had trial counsel not advised petitioner to plead guilty, he would not  
 21 have pled guilty.

22           B. Petitioner was denied effective assistance of appellate counsel, who failed to meet  
 23 the minimum constitutional standards for effective assistance of counsel, in violation  
 24 of petitioner's rights under Article I, § 11 of the Oregon Constitution and the Sixth  
 25 and Fourteenth Amendments to the United States Constitution in each of the  
 26 following respects, among others to be proved at trial:

1           1. Petitioner's appellate counsel failed to raise as an error on appeal the trial  
 2 court's failure to order a mental examination of petitioner, who was incompetent to  
 3 stand trial, unable to aid and assist in his own defense, unfit to proceed by reason of  
 4 incapacity due to a mental disease or defect, unable to knowingly, voluntarily, and  
 5 intelligently waive his constitutional rights, unable to understand the nature of the  
 6 proceedings, unable to assist and cooperate with counsel, and unable to participate in  
 7 his defense. Had appellate counsel raised such issues, the appellate courts would  
 8 have reversed petitioner's conviction.

9           2. Petitioner's appellate counsel failed to raise as an error on appeal the trial  
 10 court's erroneous acceptance of the guilty plea and the trial court's insufficient plea  
 11 colloquy with petitioner, which did not adequately determine whether petitioner's  
 12 mental condition affected his ability to knowingly, voluntarily and intelligently waive  
 13 his constitutional rights. Had appellate counsel raised such issues, the appellate  
 14 courts would have reversed petitioner's conviction.

1  
2 3. Petitioner's appellate counsel failed to raise as an error on appeal the trial  
3 court's acceptance of petitioner's plea without the knowing, voluntary and intelligent  
4 consent and waiver, in writing and on the record, by petitioner's guardian ad litem,  
Claudia Jurowski. Had appellate counsel raised this issue, the appellate courts would  
have reversed petitioner's conviction.

5 C. The trial court's failure to order a mental examination of petitioner, who was  
6 incompetent to stand trial, unable to aid and assist in his own defense, unfit to  
7 proceed by reason of incapacity due to a mental disease or defect, unable to  
8 knowingly, voluntarily, and intelligently waive his constitutional rights, unable to  
9 understand the nature of the proceedings, unable to assist and cooperate with counsel,  
10 and unable to participate in his defense, was a substantial denial in the proceedings  
11 resulting in petitioner's conviction in violation of petitioner's right to trial by jury, his  
12 right to confront his accusers, his right against compulsory self-incrimination, his  
13 right to counsel, and his right to due process of law, under Article I, §§ 11 and 12 of  
14 the Oregon Constitution and the Fifth, Sixth and Fourteenth Amendments to the  
15 United States Constitution. Had the trial court ordered a mental examination of  
petitioner, the examination would have revealed that petitioner was incompetent to  
stand trial, unable to aid and assist in his own defense, unfit to proceed by reason of  
incapacity due to a mental disease or defect, unable to knowingly, voluntarily, and  
intelligently waive his constitutional rights, unable to understand the nature of the  
proceedings, unable to assist and cooperate with counsel, and unable to participate in  
his defense. Had the trial court ordered a mental examination, the trial court would  
not have accepted petitioner's guilty plea.

16 D. The trial court's acceptance of petitioner's guilty plea, when petitioner was  
17 incompetent to stand trial, unable to aid and assist in his own defense, unfit to  
18 proceed by reason of incapacity due to a mental disease or defect, unable to  
19 knowingly, voluntarily, and intelligently waive his constitutional rights, unable to  
20 understand the nature of the proceedings, unable to assist and cooperate with counsel,  
21 and unable to participate in his defense was a substantial denial in the proceedings  
22 directly resulting in petitioner's conviction in violation of petitioner's right to trial by  
jury, his right to confront his accusers, his right against compulsory self-  
incrimination, his right to counsel, and his right to due process of law, under Article I,  
§§ 11 and 12 of the Oregon Constitution and the Fifth, Sixth and Fourteenth  
Amendments to the United States Constitution.

23 E. The trial court's plea colloquy, which directly resulted in petitioner's conviction,  
24 did not adequately determine whether petitioner's mental condition affected his  
25 ability to knowingly, voluntarily and intelligently waive his constitutional rights, and  
26 was a substantial denial in the proceedings in violation of petitioner's right to trial by  
jury, his right to confront his accusers, his right against compulsory self-  
incrimination, his right to counsel, and his right to due process of law, under Article I,  
§§ 11 and 12 of the Oregon Constitution and the Fifth, Sixth and Fourteenth



Amendments to the United States Constitution.

F. The trial court's acceptance of petitioner's guilty plea without first obtaining a knowing, voluntary, and intelligent waiver from the person whom the court had appointed as petitioner's guardian *ad litem* for this case, Claudia Jurowski, was a substantial denial in the proceedings resulting in petitioner's conviction in violation of petitioner's right to trial by jury, his right to confront his accusers, his right against compulsory self-incrimination, his right to counsel, and his right to due process of law, under Article I, §§ 11 and 12 of the Oregon Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Had the trial court asked for the guardian *ad litem*'s waiver before taking the plea, she would not have given it.

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes.

(7) Result: petition denied.

(8) Date of result (if you know): Judgment was entered on January 2, 2008.

(b) If you filed any second motion, petition, or application, give the same information: N/A.

(c) If you filed any third petition, application, or motion, provide the same information: N/A

(d) For each petition, did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion? Yes.

(e) If you did not appeal to the highest state court having jurisdiction, please explain why you did not: N/A

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting the same.

**Ground One: During the petitioner's post-conviction appeal, the Oregon appellate courts deprived the petitioner of due process of law when they failed to apply the statutorily required standard of review but instead applied one that was more favorable to the state.**

(a) Supporting Facts: The Oregon Court of Appeals applied an "any evidence" standard of appellate review. Application of this standard of review was contrary to the standard of review required by Or. Rev. Stat. 138.650. That standard, described by the Oregon Supreme Court in *Ball v. Gladden*, 250 Or. 485, 487, 443 P.2d 621 (1968) and *Moen v. Peterson*, 312 Or. 503, 511, 824 P.2d 404 (1991), provides that the court reviews the record to determine whether the post-conviction court's findings are "supported by the evidence."

The Court of Appeals upheld the PCR trial court's finding that trial counsel "had *no indications whatsoever* that petitioner was unable to aid and assist them and fully participate in the entry of his guilty pleas," by citing one piece of evidence –

1 trial counsel's self-serving denial that they had any indication of their client's  
 2 incompetence – but refusing to take into account substantial evidence to the contrary.  
 3 See Ground Two at paragraphs (a)(1)-(5), *infra*, for a description of this evidence. It  
 4 held that “even if petitioner were correct about [the PCR court’s error in finding “no  
 5 indications whatsoever”], the fact that the court’s factual finding was contradicted by  
 6 other evidence in the record is beside the point,” because “[t]he determinative  
 7 question on an appeal from a judgment dismissing a petition for post-conviction relief  
 8 is whether there is *any* evidence in the record that supports the court’s finding. *Pratt*,  
 9 201 Or. App at 220.” Slip op at 11 (emphasis in original).

7 The Court of Appeals similarly used this “any evidence” standard to reject  
 8 petitioner’s contention that the evidence established that his plea was not voluntarily  
 9 entered. It stated: “In reviewing a post-conviction court’s determination that a plea  
 10 was knowing and voluntary, we are bound by the court’s findings of fact if there is  
 11 *any* evidence in the record to support them . . .” *Id.* at 12 (emphasis added). It then  
 12 ruled: “Again, however, as in petitioner’s first assignment of error, petitioner’s  
 13 contentions founder against our standard of review.” *Id.* at 13.

11 The opinion of the Court of Appeals derived the “any evidence” standard from  
 12 *Pratt v. Armenakis*, 201 Or. App. 217, 220, 118 P.3d 821 (2005).<sup>1</sup> The *Pratt* decision  
 13 was the result of rancorous post-conviction litigation in an aggravated murder case.  
 14 In response to that petitioner’s vigorous complaints, the Oregon Court of Appeals  
 15 stated: “What petitioner fails to appreciate in his petition for reconsideration is that  
 16 our review is limited to determining whether there is *any* evidence in the record to  
 17 support the post-conviction court’s findings. *Ball v. Gladden*, 250 Or. 485, 443 P.2d  
 18 621 (1968).” 201 Or. App. at 220 (emphasis in original).

16 Significantly, while the *Pratt* opinion emphasized the word “any” in the term  
 17 “any evidence,” it failed to cite a specific page in *Ball* using that word or concept. *Id.*  
 18 In fact, the word “any” does not even appear in *Ball*, which holds: “[w]hat actually  
 19 transpired is a question of fact for the trial court or jury. If the evidence sustains such  
 20 historical factual findings they will not be disturbed by this court.” *Ball* then  
 21 analyzed the historical facts “to see if they are sufficient to justify the trial court’s  
 22 finding of voluntariness.” 255 Or. at 488.

21 Twenty-three years after *Ball*, the Oregon Supreme Court used essentially the  
 22 same standard in *Moen v. Peterson*, 312 Or. 503, 511 (1991), in reviewing a post-  
 23 conviction court’s findings pursuant to Or. Rev. Stat. 138.650. *Moen* held that the

24 <sup>1</sup> Interestingly, the state did not suggest the “any evidence” standard in its Court of Appeals’  
 25 brief: “[t]he issues for the reviewing court are whether the facts found by the post-conviction  
 26 court are supported by the record,” and “[t]his court is bound by the factual findings of the  
 post-conviction court if there is evidence in the record to support them.” State’s Br. at 7.

1 Court of Appeals must determine whether the findings are “supported by the  
 2 evidence.” 312 Or. at 511. *Moen* pointed out that “[t]he inquiry whether a finding is  
 3 supported by the evidence is a question of law, properly within the Court of Appeals’  
 4 scope of review.” 312 Or. at 511.

5 (b) If you did not exhaust your state remedies on Ground One, please explain  
 6 why: The first court to apply the erroneous standard of review was the  
 7 Oregon Court of Appeals. Petitioner then sought review by the Oregon  
 8 Supreme Court on three grounds. One of those grounds was the Court of  
 9 Appeals’ application of the incorrect standard of review. But the Oregon  
 10 Supreme Court denied review, leaving this court in a position to address the  
 11 question whether the actions of the Oregon appellate courts violated due  
 12 process when they upheld the post-conviction trial court’s ruling.

13 (c) Direct Appeal of Ground One:

14 (1) If you appealed from the judgment of conviction, did you raise this issue?  
 15 N/A

16

17 (2) If you did not raise this issue in your direct appeal, please explain why:  
 18 the federal due process violation had not yet occurred.

19 (d) Post-conviction proceedings:

20 (1) Did you raise this issue through a post-conviction motion or petition for  
 21 writ of habeas corpus in a state trial court? No, because it had not yet  
 22 occurred.

23 (2) If yes,

24 Type of motion: N/A.

25 Name and location of the court where the petition or motion was filed: N/A.

26 Docket or case number (if you know): N/A.

Date of court’s decision: N/A.

Result: (attach a copy of the opinion or order, if available): N/A.

(3) Did you receive a hearing on your motion or petition? N/A.

(4) Did you appeal from the denial of your motion or petition? N/A.

(5) If yes, did you raise this issue in your appeal? N/A.

(6) If yes,

Name and location of the court where the appeal was filed: N/A.

Docket or case number (if you know): N/A.

Date of the court’s decision: N/A.

Result: (attach a copy of the opinion or order, if available): N/A.

(7) If your answer is no, explain why you did not raise this issue: See answer  
 contained in paragraph 1.

(e) Other remedies: Describe any other state remedies that you have used to exhaust  
 ground one: N/A.



**Ground Two: Trial counsel provided ineffective assistance, in violation of the Sixth Amendment. They failed to consult their experts, to request a competency hearing, or to inform the trial court of their client's deteriorating mental health, after they learned that their seriously mentally ill client's mental health had seriously deteriorated when he was removed from his powerful antipsychotic medications, but before they proceeded with the petitioner's guilty plea.**

(a) Supporting Facts: Kip Kinkel is a paranoid schizophrenic. He suffers delusions and auditory hallucinations. His most prominent delusion is that the government planted a computer chip in his brain. He believes the chip is connected to two satellites: one controls him by transmitting three distinct voices into his head; the other observes all his actions. His paranoia causes him, *inter alia*, to fear people with cameras, particularly people wearing eyeglasses, who he believes are photographing him through cameras concealed in their glasses.

He also receives command hallucinations. These hallucinations are extremely upsetting. *Id.* He has tried to escape from them. He found in some cases that the only way to escape the hallucinatory voices was to do what they commanded him to do.

The petitioner asserted that his trial counsel were ineffective for failing to request that the trial court conduct a mental competency inquiry. Trial counsel possessed a great deal of evidence raising a substantial doubt about petitioner's mental competence. They believed their client's severe mental illness provided the most compelling mental defense they had ever seen. They knew he had been off his very strong antipsychotic medication for several months right up to the time of his guilty plea, knew he was getting worse and worse, knew he would only be able to make it through a trial if he was heavily medicated, and knew their main mental health experts for trial had not seen their client during the several months he was off of his medication. Yet trial counsel did not even take one simple step—consulting one of their experts, obtaining a competency evaluation, or simply telling the trial court what they knew—to ensure that the plea would be voluntary.

The evidence known to petitioner's trial counsel that would have raised a substantial doubt about petitioner's competence to any adequate and effective defense lawyer included:

1. Jail treatment records from trial counsel's file, which they received before the guilty plea, showing that petitioner was having hallucinations and begging to restart his antipsychotic medications.

2. Dr. James McDonald's private treatment records from counsel's file, sent to counsel just days before the plea, confirmed the mental deterioration revealed by the jail treatment records.

1           3. Dr. McDonald's affidavit, admitted as his PCR trial testimony, showing  
2           that petitioner was doing very badly in the period before the guilty plea: his "mental  
3           state was compromised in the four months leading up to his guilty plea;" and "as Kip  
4           got closer to the plea agreement and his anxieties increased, the probability is that his  
5           psychosis increased and his capacity dropped." Dr. McDonald's affidavit disclosed  
6           that he conferred regularly with trial counsel about how petitioner was doing, and that  
7           in all likelihood would have done so around the time of the guilty plea.

8           4. Less than 30 days before the plea, the defense investigator told trial  
9           counsel that petitioner "was much worse ... so agitated that he would pace, hit one  
10          wall, turn, pace to the next wall, hit it, etc. He was in anguish and it was  
11          disconcerting to me." In response, counsel "acknowledged that he had seen Kip in  
12          this state, as well."

13          5. Months before the plea, the state's premier child psychologist who had  
14          evaluated petitioner, Dr. Orin Bolstad, told trial counsel that petitioner would need "a  
15          large amount of antipsychotic medication before he went into the courtroom."<sup>2</sup> Yet,  
16          trial counsel failed to consult Dr. Bolstad about whether petitioner was capable of  
17          entering a voluntary plea without his powerful antipsychotic medication.<sup>3</sup>

18          Despite being confronted with this substantial evidence – obvious indications  
19          to trial counsel that petitioner's serious mental illness was worsening in the days  
20          before entry of his guilty plea – the PCR trial court found that counsel had "no  
21          indications whatsoever" of incompetence:

22               33. Trial counsel had *no indications whatsoever* that petitioner was  
23               unable to aid and assist them and fully participate in the entry of his  
24               guilty pleas. If either attorney had seen any evidence whatsoever  
25               pointing to petitioner's inability to proceed, they would have  
26               conducted a competency evaluation on their own or asked the court to  
                order one.

                Slip op. at 9 (emphasis added).

                The Court of Appeals rejected the petitioner's attack on this finding: "even if  
                petitioner were correct about that, the fact that the court's factual finding was  
                contradicted by other evidence in the record is beside the point," because "[t]he  
                determinative question on an appeal from a judgment dismissing a petition for post-

<sup>2</sup> Similarly, Dr. McDonald informed counsel that, with "the medications [petitioner] was on  
he was able to control the voices."

<sup>3</sup> Petitioner re-started his medication only a few days before his plea. Undisputed expert  
testimony established that it takes at least two weeks "before [the antipsychotic medications]  
have an impact."

conviction relief is whether there is *any* evidence in the record that supports the court's finding. *Pratt*, 201 Or. App. at 220." *Id.* at 11 (emphasis in original).

(b) If you did not exhaust your state remedies on Ground Two, please explain why: N/A.

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue? No.

(2) If you did not raise this issue in your direct appeal, please explain why: In Oregon, this issue must be raised in post-conviction proceedings.

(d) Post-conviction proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for writ of habeas corpus in a state trial court? Yes.

(2) If yes,

Type of motion: post-conviction petition.

Name and location of the court where the petition or motion was filed: Marion County Circuit Court.

Docket or case number (if you know): 03C-21079.

Date of court's decision: Judgment was entered on January 2, 2008.

Result: petition denied (copy of the Findings of Fact and Conclusions of Law attached):

(3) Did you receive a hearing on your motion or petition? Yes.

(4) Did you appeal from the denial of your motion or petition? Yes.

(5) If yes, did you raise this issue in your appeal? Yes.

(6) If yes,

Name and location of the court where the appeal was filed: Oregon Court of Appeals.

Docket or case number (if you know): CA A137866.

Date of the court's decision: January 12, 2011.

Result: denial of petition affirmed (opinion attached).

(7) If your answer is no, explain why you did not raise this issue: N/A.

(e) Other remedies: Describe any other state remedies that you have used to exhaust ground two: N/A.

**Ground Three: The petitioner's plea was not voluntarily entered, in violation of the due process clause of the Fourteenth Amendment.**

(a) Supporting Facts: The petitioner contended that his serious paranoid schizophrenia, combined with the lack of antipsychotic medication for a prolonged period, left him incapable of making "a reasoned choice among the alternatives presented to him." Renowned OHSU child psychiatrist, Dr. William Sack, opined

1 that petitioner did not enter his plea voluntarily. The State presented no testimony to  
2 the contrary.

3 Dr. Sack explained that petitioner's paranoia compelled him to hide his  
4 illness, so much so that he was unwilling to consider any sentence that would require  
5 him to be committed to a mental hospital. "He was terrified of being labeled mentally  
6 ill" because others would discover that he was "nuts."

7 He was not going to the state hospital. Nobody was going to see that  
8 he was nuts.

9 \*\*\*

10 He didn't have the capacity to do that [make a reasoned plea choice]  
11 because of his mental illness, because of the secrecy, because of his  
12 attitude toward mental illness and being frightened of being in a state  
13 hospital.

14 Dr. Bolstad agreed. He explained that petitioner did not understand his  
15 disease then and did not want anybody to see him as mentally ill and did not want to  
16 be so labeled. Petitioner thought mental illness was like mental retardation and  
17 "certainly wanted to avoid being acknowledged for that."

18 Dr. Bolstad explained a second reason why petitioner would never willingly  
19 go to trial – his mental illness caused a tremendous fear of going to court.

20 . . . the real motivator – the real reason why he was willing to accept  
21 these terms and agree that he understood all of these things was simply  
22 because of his mental illness. . . . he had an irrational fear of going to  
23 court. . . . he had tremendous fear of court causing his voices to  
24 escalate. . . . he had tremendous fear of the DA's office and the  
25 conspiracies he saw taking place. He had tremendous fear of people  
26 misrepresenting him and saying inaccurate things about him. And I  
would say the way he responded to all those things were irrational. It  
was part and parcel of his mental illness.

\*\*\*

. . . his mission in life at that time was to avoid going to court.

\*\*\*

. . . first and foremost he had great fear of the voices coming on very  
strongly to him. This is a fear that was extremely consistent  
throughout his history of having a mental illness. He had tremendous  
fear of the voices ganging up on him. So much so that – I think a large  
part of the reason why he killed his parents was to get the voices to  
leave him alone. That's a pretty strong fear of voices, and I think he  
wanted to avoid that at all costs.



1           The State's expert psychologist, Dr. Johnson, agreed "that Kip does hear  
2 hallucinations – auditory hallucinations," acknowledged that hearing the  
3 hallucinatory voices for Kip "is painful and torturous and very difficult," and agreed  
4 that "[Kip] hates going to court".

5           At his attorneys' direction, the petitioner stopped taking his antipsychotic  
6 medication on July 2, 1999. By July 21, he was reporting that the auditory  
7 hallucinations had returned, even though his attorneys had instructed him not to  
8 discuss them. He continued to report them throughout August. By September 8,  
9 1999, just 15 days before he accepted the plea offer, he "experienced active  
10 hallucinations during evaluation." By September 21, two days before he accepted the  
11 plea offer, he was curled in a ball having difficulty breathing following a panic attack  
12 and reporting the "voices."

13           The petitioner's numerous mental health experts were unaware of the  
14 petitioner's deterioration. They had not seen the petitioner for many months. They  
15 believed the case was going to trial and that, consistent with Dr. Bolstad's advice, the  
16 petitioner would be heavily medicated to enable him to withstand the pressure from  
17 the voices. They were not consulted regarding the petitioner's ability to decide on a  
18 complex plea offer, particularly at this point in time, when the voices inside his head  
19 were raging because he had been without his antipsychotic medication for a lengthy  
20 period.

21           Because trial counsel failed to consult their experts regarding whether  
22 petitioner was capable of making a voluntary plea decision without the benefit of his  
23 powerful medications, neither defense counsel nor the trial court learned that the  
24 petitioner's mental illness, without the benefit of medication, would not allow him to  
25 consider a trial, both because it would require him to endure the pounding voices, and  
26 because, if successful, it would require him to go to a mental hospital where his  
27 mental illness would be revealed. They did not learn that his mental illness would  
28 compel him to always choose to plead guilty to avoid a trial and to avoid  
29 hospitalization, and that therefore, he could not make a "reasoned choice" without his  
30 medication.

31           The petitioner's plea colloquy consisted of one-word "yes" answers to the trial  
32 court's multitude of leading questions. There was one exception. That exception  
33 occurred when the court asked whether petitioner's mind was clear and whether he  
34 was under the influence of any drugs that would affect him. Before the petitioner  
35 could answer, his counsel interjected and informed the court that "the record should  
36 be clear that [the petitioner] has recently taken the prescription medications Zyprexa,  
37 which is an antipsychotic, and Ativan, which is a tranquilizer." Counsel then told the  
38 court that counsel had "discussed that with [petitioner]," and "[i]t does not affect his  
39 ability to reason, his ability to understand the proceedings that are before the court."  
40 *Id.*

41           Thus, the one time when the topic of clear mindedness and medication was  
42 addressed, counsel stepped in and answered for the petitioner. Counsel did not advise

1 the court that: the medication, which made petitioner's mind clearer, had been  
 2 discontinued for months; petitioner's mental illness had worsened during this period,  
 3 including the return of active hallucinations; or, while restarted a few days before, the  
 4 antipsychotic medication had not taken effect at the time of the plea.<sup>4</sup>

5 (b) If you did not exhaust your state remedies on Ground Three, please explain  
 6 why: N/A.

7 (c) Direct Appeal of Ground Three:

8 (1) If you appealed from the judgment of conviction, did you raise this issue?  
 9 No.

10 (2) If you did not raise this issue in your direct appeal, please explain why:  
 11 Oregon law required that this issue be raised by post-conviction litigation.

12 (d) Post-conviction proceedings:

13 (1) Did you raise this issue through a post-conviction motion or petition for  
 14 writ of habeas corpus in a state trial court? Yes.

15 (2) If yes,

16 Type of motion: Post-conviction petition.

17 Name and location of the court where the petition or motion was filed: Marion  
 18 County Circuit Court.

19 Docket or case number (if you know): 03C-21079.

20 Date of court's decision: Judgment was entered on January 2, 2008.

21 Result: (attach a copy of the opinion or order, if available): denial of petition.

22 (3) Did you receive a hearing on your motion or petition? Yes.

23 (4) Did you appeal from the denial of your motion or petition? Yes.

24 (5) If yes, did you raise this issue in your appeal? Yes.

25 (6) If yes,

26 Name and location of the court where the appeal was filed: Oregon Court of  
 Appeals.

Docket or case number (if you know): CA A137866

Date of the court's decision: January 12, 2011.

Result: (opinion attached).

(7) If your answer is no, explain why you did not raise this issue: N/A.

(e) Other remedies: Describe any other state remedies that you have used to exhaust  
 ground three: none.

<sup>4</sup> Attorney Sabbitt did not even ask petitioner if he was hearing voices for "weeks before he entered his plea," including the time when he presented the plea offer to petitioner and when petitioner entered his guilty plea. In fact, he did not even observe petitioner's demeanor during the plea hearing, because, in counsel's words, "it's time to close it."

1 13. Please answer these additional questions about the petition you are filing:

2 (a) Have all grounds for relief that you have raised in this petition been presented to  
3 the highest state court having jurisdiction? No.

4 If your answer is "No," state which grounds have not been so presented and give your  
5 reason(s) for not presenting them: Ground one. There was no opportunity to present  
6 it. The violation itself occurred during the post-conviction appeal, when the Oregon  
7 appellate courts failed to apply the standard of review required by the state post-  
8 conviction statute.

9 (b) Is there any ground in this petition that has not been presented in some state or  
10 federal court? If so, which ground or grounds have not been presented, and state your  
11 reasons for not presenting them: Same answer as in "(a)" above.

12 14. Have you previously filed any type of petition, application, or motion in a federal  
13 court regarding the conviction that you challenge in this petition? No. If so, which  
14 ground or grounds have not been presented, and state your reasons for not presenting  
15 them: N/A. If "Yes," state the name and location of the court, the docket or case  
16 number, the type of proceeding, the issues raised, the date of the court's decision, and  
17 the result for each petition, application, or motion filed. Attach a copy of any court  
18 opinion or order, if available.

19 15. Do you have any petition or appeal now pending in any court, either state or federal,  
20 for the judgment you are challenging? No. If yes, state the name and location of the  
21 court, the docket or case number, the type of proceeding, and the issues raised: N/A.

22 16. Give the name and address, if you know, of each attorney who represented you in the  
23 following states of the judgment you are challenging:

24 (a) At preliminary hearing: N/A.

25 (b) At arraignment and plea: Mark Sabbitt, 747 Willamette St. Eugene, OR  
26 97401, and Richard Mullen, 72-A Centennial Loop, Ste. 140, Eugene, OR  
97401.

(c) At trial: same.

(d) At sentencing: same.

(e) On appeal: Jesse Barton, P.O. Box 5545, Salem, OR 97304.

(f) In any post-conviction proceeding: Dennis Balske and Lawrence Matasar,  
621 SW Morrison, Suite 1025, Portland, Oregon 97205.

(g) On appeal from adverse ruling in a post-conviction proceeding: same as in f.

17. Do you have any future sentence to serve after you complete the sentence for the  
judgment that you are challenging? No.

1 18. Timeliness of the petition: If your judgment of conviction became final over one year  
2 ago, you must explain why the one-year statute of limitations does not bar your  
3 petition: N/A.

4 WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may  
5 be entitled in this proceeding.

6 

7 Dennis N. Balske

8 Attorney for Kipland Kinkel  
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